8 of the Government Proceedings Ordinance, 1956, are clear and are not, in my view, in any way affected by the provisions of section 80 of the Local Government Act, 1976. It was my judgment therefore that the plaintiff in this case could not sue the defendants without the prior consent in writing of the Attorney-General.

Counsel for the plaintiff, Mr. Ghazi, also referred to section 54(k) of the Specific Relief Act, 1950, and argued that the plaintiff had a personal interest in the matter under section 80 of the Local Government Act, 1976. It was not disputed by either party that no plaintiff can maintain a suit to obtain specific or preventive relief for which he cannot show in himself the *locus standi*. Thus it has been held in the Indian case of *N.W.Ry. Administration v. N.W.Ry. Union, Lahore*[11] that an injunction cannot be granted under the corresponding section 55(k) of the Indian Specific Relief Act, 1877, when the plaintiff had no personal interest in the matter. Although the plaintiff in this case is statutorily required to abate nuisances under section 80 of the Local Government Act, 1976, I could not agree with counsel's contention that that section gave the plaintiff a personal interest in this matter within the meaning of section 54(k) of our Specific Relief Act, 1950. Counsel for the plaintiff's alternative argument was that section 54 of the Specific Relief Act, 1950 was not applicable in this case and if this case was not covered by the said section 54 then an injunction should not be refused. Here again I was of the view that the position is that if the case falls within section 54 of the Specific Relief Act, 1950, then no injunction can be granted. But even if the said section 54 did not apply, then section 52 of the Specific Relief Act, 1950 also applies and the plaintiff would still have to prove the breach of an obligation existing in its favour before it can obtain a permanent injunction or even a temporary injunction. In this case however it has not been shown to me what obligation exists the breach of which entitles the plaintiff to the grant of a perpetual injunction.

In the above-quoted case of *Hampshire C.C.* v. *Shonleigh Nominees Ltd.*,[9] Plowman J. made no order pending an application for fiat of the Attorney-General. He also indicated that if a fiat was given, leave to amend by joining the Attorney-General as a co-plaintiff would be given; but if the fiat was refused the plaintiff's summons would be struck out. In this case, I was of the view that under section 8(1) of our Government Proceedings Ordinance, 1956, either the Attorney-General or two or more persons *having obtained* the consent in writing of the Attorney-General, should have instituted this suit in the first instance. Therefore having considered all the circumstances of this case, I decided to allow this application and ordered this action be dismissed with costs under O.25 r.3 of the Rules of the Supreme Court, 1957, and I also ordered the dissolution of the temporary injunction granted on December 15, 1977 and an inquiry as to damages to be held before the Senior Assistant Registrar, Penang.

Action dismissed.

Solicitors: *Presgrave & Matthews; Jag-Jit Singh & Co.*

THE HONGKONG AND SHANGHAI BANKING CORPORATION v. ISMAIL BIN DAUD & ANOR.

[O.C.J. (Mohamed Zahir J.) March 12, 1977]
[Kota Bharu — Civil Suit No. 146 of 1976]

Practice & Procedure — Judgment in default of appearance — Application to set aside — Plea of good defence — Whether there was a prima facie defence — R.S.C. 1957, O. 13 rr. 3 & 10.

This was a liquidated claim by the plaintiff against the defendants as guarantors under a guarantee. The first defendant sought to set aside the default of appearance judgment of October 25, 1976 made by the Senior Assistant Registrar. He contended that he was served with the writ only on November 14, 1976 and not as alleged by the process server on October 15, 1976. The first defendant also pleaded that he had a good defence to the plaintiff's claim.

Held, dismissing the first defendant's application: (1) there was evidence to show that the first defendant had been served with the writ on October 15, 1976;

(2) in an application of this nature the defendant must produce to the court evidence that he had a *prima facie* defence. The first defendant's application can only be interpreted as merely an attempt to delay repayment.

Case referred to:-

(1) *Evans* v. *Bartlam* [1937] A.C. 480.

CIVIL SUIT.

Yusof bin Haji Mohamed Nor for the first defendant.

Datuk H.L. Wrigglesworth for the plaintiff.

Mohamed Zahir J.: The 1st defendant is applying to set aside the default of appearance judgment dated October 25, 1976 made by the learned Senior Assistant Registrar. The reasons given in his affidavit are as follows:

(a) that he was served with the writ only on November 14, 1976 and not as alleged by the Process Server that it was served on him on October 15, 1976 at Batu 3½ Jalan Pengkalan Chepa, Kota Bharu;

(b) that he has a good defence to the plaintiff's claim. He first filed a proposed defence and some time later filed an amendment thereto.

In his affidavit dated January 22, 1977 the 1st defendant alleged that on October 9, 1976 he was in Singapore and Johore until October 12 and then he returned to Kuala Lumpur and remained in Kuala Lumpur until October 22, 1976 when he returned to Kota Bharu and he exhibited the photostat copy of relevant pages of his diary and endorsement on his passport. The Court Process Server in his affidavit affirmed on October 16, 1976 alleged that on October 15, 1976 he served the writ on 1st defendant at Batu 3½ Jalan Pengkalan Chepa, Kota Bharu and that he (1st defendant) received the writ but he refused to sign acknowledging receipt of the same. The 1st defendant in alleging that he was in Kuala Lumpur at the material time was therefore alleging improper motive and deceit on the part of the Court Process Server. However, the 1st defendant went no further than making the allegation. He had no other proof other than his diary. I read through the contents of the diary and I am not satisfied with the allegations therein. For instance, on the material date, October 15, 1976, the entries in the diary indicate something suspicious in the manner and the wordings they were

written. In the arguments before me counsel for the plaintiff brought out the fact that an MAS ticket from Kuala Lumpur to Kota Bharu was purchased in the name of the 1st defendant for flight on the same date. Counsel for 1st defendant admitted that his client bought the ticket but someone else travelled in the plane on that day. I think the evidence is overwhelming against the 1st defendant that he had been served with the writ on October 15, 1976 and I therefore reject his contention that he had not been served with the writ.

His counsel sought an adjournment of the argument so as to enable him to produce other evidence on this point but I do not think that it is expedient for me to adjourn the case at this stage. The 1st defendant had all the time to bring out any other evidence before the hearing of his application and his failure to do so, only suggested to me that there could be no other evidence.

Now as regards the second ground that the 1st defendant has a good defence. The 1st defendant admits in his amended proposed defence that he jointly with 2nd defendant had executed a Letter of Guarantee in favour of the plaintiff whereby he guaranteed, *inter alia*, that in consideration of the plaintiff making or continuing advances to the Principal of which the defendants were the sole directors and shareholders the defendants would repay to the plaintiff upon demand being made to them in writing all moneys advanced to or paid for on account of the Principal together with interest up to a limit of $2,000,000.

The 1st defendant alleged in his amended proposed defence that the plaintiff had allowed the Principal vide an agreement the repayment of the debt in accordance with an agreed schedule of repayment and that the Principal had not committed any breach of the agreement of scheduled repayment and denied that the Principal had not paid the debt due to the plaintiff on the guarantee and that the plaintiff had discharged the 1st defendant from all liability over the guarantee by giving time to the Principal.

The 1st defendant went on to plead that the plaintiff had failed to serve on him notice of default under the guarantee and that there was no admission or acknowledgment in writing by the Principal of the amount of indebtedness or there is no judgment or award obtained by the plaintiff or there was no statement of account.

Lastly, it was alleged that the amount claimed by the plaintiff was interest on another loan guaranteed by SEDC and not on the guarantee as claimed.

In an application of this nature the defendant must produce to the court evidence that he has a *prima facie* defence. In *Evans* v. *Bartlam*[1] Lord Atkin said thus:—

"The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence."

It is now for me to decide whether the amended proposed defence contains a *prima facie* defence and that the 1st defendant has filed an affidavit of merits producing such defence.

In my opinion, except for the allegations in the amended proposed defence there is nothing in the affidavit of the 1st defendant that satisfies me that he has a *prima facie* defence. There is no evidence of the alleged written agreed schedule of repayment being produced with the affidavit and neither that part of the evidence that the Principal was not indebted to the plaintiff or that the plaintiff has discharged the 1st defendant of the liability under the guarantee. It is rather difficult for me to understand why he had not obtained these evidence, such as copies of agreement, receipts of payment or any letter to relieve him of his obligation in the Suit particularly as both the defendants, as admitted, are also the sole directors and shareholders of the Principal company.

As regards the allegation that the plaintiff's claim is on the interest of another loan guaranteed by SEDC, the 1st defendant in his affidavit produced copy of a writ in Civil Suit No. 152/1976 in which the plaintiff sued SEDC for $2,839,200/- which was a sum guaranteed by SEDC in favour of the principal. These two Suits are clearly not the same. The writ before me now is a claim on the guarantee dated June 20, 1974 and which is admitted by the 1st defendant whereas the other Suit was on another guarantee dated December 31, 1973. The 1st defendant could not even produce a proper account on the interest but produced a rough calculation made by himself as exhibit 5. I cannot accept this sort of calculation. The figure claimed involved millions of dollars and the 1st defendant appears to be incapable of producing a proper Accountant's Certificate to support his claim.

In relation to the allegation that the 1st defendant did not have actual notice of demand as alleged under paragraph 6 of the affidavit affirmed on January 22, 1977, the 1st defendant contended that the words "Ta' Mahu terima 26/7/76" written on the registered letter containing the demand sent by the plaintiff, could refer to his wife who had been in the habit of refusing to accept registered posts when he was not at home. Again there was nothing in the said affidavit to say specifically that it was the wife who refused to accept and the affidavit had these words "... need not be referring to my refusal to accept...." This is certainly not *prima facie* evidence for the 1st defendant that he did not receive the demand. Further, the guarantee provides that "Any demand for payment or notice under this guarantee shall be sufficiently given if sent by post or delivered by hand to the last known address of the person to whom or to whose personal representatives such demand or notice is to be made or given and shall be assumed to have reached the addressee in the course of post if given by post...." I am satisfied that the demand was not only sent by post to the last known address of the 1st defendant it also reached the 1st defendant as evidenced by the refusal to accept the same. Again, as submitted by the plaintiff's counsel, in equity a person cannot plead his own default.

As regards the defence that there was no admission or acknowledgment in writing of the Principal of the amount of the indebtedness as provided by paragraph 1 on page 3 of the guarantee, I think this is one of the conditions that the plaintiff can make the claim on the guarantors. The other condition enabling the

plaintiff to call for payment appears in paragraph 1 of page 1 as follows:—

"WE HEREBY JOINTLY AND SEVERALLY GUARANTEE to you the repayment on demand in writing being made to us/me by you or any of your duly authorised officers of all moneys advanced to or paid for or on account of the Principal Debtor whether before or after the date hereof and interest thereon remaining unpaid or which shall at any time hereafter be owing or payable to you on any account whatsoever by the Principal Debtor, including all interest charges for commission and other usual Bankers' charges."

This is a liquidated claim by the plaintiff and the 1st defendant is not alleging that the contract between himself and the plaintiff is unenforceable and if the application is allowed it only serves to delay repayment by the 1st defendant. But the 1st defendant may on the other hand be condemned to costs and the interest will run all the same. Thus I can only interpret the 1st defendant's application as merely an attempt to delay repayment.

In the circumstances, I dismiss the 1st defendant's application with costs.

Application dismissed.

Solicitors: *Yusof & Co.; Wrigglesworth & Co.*

CHE SU BINTI DAUD v. PUBLIC PROSECUTOR

[O.Cr.J. (Gunn Chit Tuan J.) March 14, 1978]

[Penang — Criminal Application No. 6 of 1978]

Criminal Law and Procedure — Bail — Application for — Dangerous drugs — Accused, mother of 5 children, charged for trafficking in dangerous drugs — Accused with 4-month old baby who needed breastfeeding in prison — Factors for consideration in granting or refusing bail — Criminal Procedure Code (F.M.S. Cap. 6), ss. 388 & 389 — Dangerous Drugs Ordinance 1952, s. 39(B)(1)(a).

Dangerous Drugs — Bail — Application for — Factors for consideration in granting or refusing bail — Criminal Procedure Code (F.M.S. Cap. 6), ss. 388 & 389 — Dangerous Drugs Ordinance, 1952, s. 39(B)(1)(a).

The accused was charged together with her husband and her brother for trafficking in dangerous drugs under section 39(B)(1)(a) of the Dangerous Drugs Ordinance, 1952. Her application for bail was refused by the Special Sessions Court. The offence with which the accused had been charged was punishable with death or imprisonment for life. The accused was a mother of six children, aged 11, 9, 6, 4, 3 years and 4 months old respectively. Her 4-month old baby had to be with her in prison as she was still breastfeeding the child. Her trial was not to be heard yet for another three months and could possibly, be even later.

Held, allowing bail: (1) though a Judge has under sections 388 and 389 of the Criminal Procedure Code absolute discretion in granting bail, that discretion must be exercised judicially and he should not (save for exceptional and very special reasons) grant bail if there appears reasonable grounds for believing that the accused had been guilty of an offence punishable with death or life imprisonment;

(2) in the circumstances of this case the accused should be admitted to bail.

Cases referred to:-

(1) *Re K.S. Menon* [1946] M.L.J. 49.

(2) *R.* v. *Ooi Ah Kow* [1952] M.L.J. 95.

(3) *Public Prosecutor* v. *Latchemy* [1967] 2 M.L.J. 79.

(4) *Public Prosecutor* v. *Wee Swee Siang* [1948] M.L.J. 114.

(5) *Keshav Vasudeo Kortikar* v. *Emperor* A.I.R. 1933 Bom. 492.

CRIMINAL APPLICATION.

C.V. Prabhakaran for the applicant.

Haidar bin Mohamed Noor (Deputy Public Prosecutor) for the respondent.

Gunn Chit Tuan J.: The accused/applicant was charged together with her husband Salien bin Saud and her brother Ismail bin Daud in the Sessions Court in Butterworth on March 5, 1978, for an alleged offence of trafficking in dangerous drugs under section 39(B)(1)(a) of the Dangerous Drugs Ordinance, 1952 (F.M. No. 30 of 1952). The case was transferred to the Special Sessions Court in George Town and when she appeared before the President of the Special Sessions Court, George Town, on March 6, 1978 her application for bail was refused, but she was apparently advised by the learned President to apply to the High Court for bail.

Though a judge has under sections 388 and 389 of the Criminal Procedure Code (F.M.S. Cap. 6) absolute discretion in granting bail, that discretion must be exercised judicially and he should not (except for exceptional and very special reasons) grant bail if there appears reasonable grounds for believing that the accused has been guilty of an offence punishable with death or life imprisonment. (See *Re K.S. Menon*(1) and *Regina* v. *Ooi Ah Kow*(2)). The offence with which the accused/applicant has been charged is punishable on conviction under section 39(B)(2) of the Dangerous Drugs Ordinance, 1952, with death or imprisonment for life and also, if the offender is not sentenced to death, with whipping. It was therefore necessary for me to consider some of the facts before me in order to find out whether there were any exceptional or very special reasons in the present case for bail to be granted. What constitutes exceptional and special reasons must necessarily depend on the facts of each case. I was, of course, aware that I should not make any statements which were likely to, or probably be construed as indicating my views of the case, though I was at a disadvantage in considering this application when there was little of the evidence before me which it was intended to adduce at the trial.

However, according to the affidavit filed in support of the application, the accused/applicant has affirmed that she was in her bedroom feeding her 4-month old baby on the day and time in question when she was arrested. She was not aware that there were any drugs in her house at that time, and although the incriminating articles were found in her house, they were not in her possession. She has 6 children who are 11 years, 9 years, 6 years, 4 years, 3 years and 4 months old respectively. Since her arrest all her children, except the youngest one, have been in the care of their grandparents who are old and unable to give them proper attention. She herself was in poor health and her youngest child has been staying with her in the prison where conditions were such as not to be conducive to the child's health as well as to her health as she was not able to get special food for both of them. Her 4-month old baby has to be with her in prison as she was still breast-feeding the